

January 2001

STATE LIABILITY FOR OCCUPATIONAL AND PROFESSIONAL LICENSING BOARDS

This memorandum addresses two issues relating to occupational and professional licensing boards--whether the state is financially liable for the activities and actions of occupational and professional licensing boards and whether any statutory restrictions exist which would prohibit an occupational and professional licensing board from maintaining a deficit fund balance.

LIABILITY OF OCCUPATIONAL AND PROFESSIONAL LICENSING BOARDS

In September 1994 the North Dakota Supreme Court abolished the doctrine of sovereign immunity in a four to one decision. In *Bulman v. Hulstrand Constr. Co. and the State of North Dakota*, 521 N.W.2d 632 (N.D. 1994), the Supreme Court held that Section 9 of Article I of the Constitution of North Dakota "does not bestow exclusive authority upon the legislature to waive or modify sovereign immunity of the State from tort liability and does not preclude this Court from abolishing that common-law doctrine." Although the court abolished sovereign immunity, the court indicated that its decision should not be interpreted to import tort liability for the exercise of discretionary acts, including legislative and quasi-legislative acts and judicial and quasi-judicial acts.

In 1995 the Legislative Assembly enacted legislation, codified as North Dakota Century Code (NDCC) Chapter 32-12.2, which provided for the procedures, limits, and exclusions for bringing claims against the state for personal injury or property damage. Under NDCC Section 32-12.2-01(7), "state" includes "an agency, authority, **board**, body, branch, bureau, commission, committee, council, department, division, industry, institution, instrumentality, and office of the state." (emphasis supplied) Section 32-12.2-01(2) defines "injury" as "personal injury, death, or property damage" and Section 32-12.2-01(5) provides that "property damage" includes "injury to or destruction of tangible or intangible property damage." Based upon the definitions of "state" contained in this chapter, an occupational or professional board is considered "state" and, therefore, participates in and is covered by the risk management fund. Pursuant to Chapter 32-12.2, the state would defend and be liable for up to \$250,000 per person and \$1,000,000 for any number of claims arising from any single occurrence in an action against an occupational or professional board for an injury proximately caused by the alleged negligence, wrongful act, or omission.

Section 32-12.2-02 contains a number of exclusions for which neither the state nor a state employee may be held liable under the chapter. Section 32-12.2-02(3)(d) excludes "a claim resulting from a decision to undertake or a refusal to undertake any judicial or quasi-judicial act, including a decision to grant, to grant with conditions, to refuse to grant, or to revoke any license, permit, order, or other administrative approval or denial."

DEFICIT FUND BALANCE OF OCCUPATIONAL OR PROFESSIONAL BOARDS

While there is no specific constitutional or statutory provision prohibiting an occupational or professional board or other state entity from maintaining a deficit fund balance, there are several theories that may be applicable.

Powers of Occupational or Professional Boards

North Dakota Century Code Title 43 contains statutes relating to power, duties, and limitations on the licensing boards of the various occupations and professions included in this title. Any powers granted to an occupational and professional licensing board contained in this title exists by virtue of a legislative grant of those powers. The North Dakota Supreme Court has reviewed the extent of the authority of various legislatively created entities, including cities and school boards. In *Ebach v. Ralston*, 469 N.W.2d 801, 804 (N.D. 1991), the court held that cities are creatures of statute and possess only those powers and authorities granted by statute or necessarily implied from an express statutory grant. The court, regarding school boards, has held that public schools of the state are under legislative control and that school boards have no powers except those conferred by statute (*Seher v. Woodlawn School Dist. No. 26*, 59 N.W.2d 805 (N.D. 1953)); that school boards may exercise only those powers as are expressly or impliedly granted by statute (*Fargo Educ. Ass'n v. Fargo Pub. School Dist. No. 1*, 291 N.W.2d 267 (N.D. 1980)); and that, in defining the powers of school officers, the rule of strict construction applies, and any doubt as to the existence or extent of those powers must be resolved against the school board (*Batty v. Board of Education of City of Williston*, 269 N.W. 49 (N.D. 1936)).

Based upon the court's analysis of legislatively created entities, an occupational or professional licensing board is a creature of statute and may exercise only those powers expressly or impliedly granted by statute. While several of the statutes contained in Title 43 expressly grant licensing boards the authority to spend the funds that the board collects, none of the licensing boards contained in Title 43 has been granted the authority to overspend or maintain a deficit balance. Because the powers of the boards do not include the express or implied authority to maintain a deficit fund balance, it may be concluded that a board does not have the authority to do so.

Constitutional Prohibition on Indebtedness

Section 13 of Article X of the Constitution of North Dakota, which deals with debt of the state, provides:

The state may issue or guarantee the payment of bonds, provided that all bonds in excess of two million dollars shall be secured by first mortgage upon real estate in amounts not to exceed sixty-five percent of its value; or upon real and personal property of state-owned utilities, enterprises, or industries, in amounts not exceeding its value, and provided further, that the state shall not issue or guarantee bonds upon property of state-owned utilities, enterprises, or industries in excess of ten million dollars.

No further indebtedness shall be incurred by the state unless evidenced by a bond issue, which shall be authorized by law for certain purposes, to be clearly defined. Every law authorizing a bond issue shall provide for levying an annual tax, or make other provision, sufficient to pay the interest semiannually, and the principal within thirty years from the date of the issue of such bonds and shall specially appropriate the proceeds of such tax, or of such other provisions to the payment of said principal and interest, and such appropriation shall not be repealed nor the tax or other provisions discontinued until such debt, both principal and interest, shall have been paid. No debt in excess of the limit named herein shall be incurred except for the purpose of repelling invasion, suppressing insurrection, defending the state in time of war or to provide for the public defense in case of threatened hostilities. (emphasis supplied)

The North Dakota Supreme Court has addressed the indebtedness provision contained in Section 13 and has held that if a debt is backed by the state it must

comply with the constitutional debt limitation of this section. *State ex rel. Lesmeister v. Olson*, 354 N.W.2d 690, 696 (N.D. 1984). The court, however, has made two exceptions, known as the "current expenses" exception and the "special fund" exception, to this general rule.

With regard to the "current expenses" exception, the court has stated that "[t]he term 'indebtedness,' as used in [Article X, Section 15] of our constitution as amended, means the amount of debts less collectible taxes and other funds." *Jones v. Brightwood Independent School District No. 1*, 247 N.W. 884, 887 (N.D. 1933). The court has also concluded that "debt" and "indebtedness" as used in [Article X, Section 15] refer to pecuniary obligations imposed by contract, except obligations to be satisfied out of current revenue." *Haugland v. City of Bismarck*, 429 N.W.2d 449, 455-56 (N.D. 1988). Using the court's rationale in these cases, debt incurred by an occupational or professional board which is payable within the biennium is exempt from the constitutional debt limitation under the "current expenses" exception.

With regard to the state debt limit and the "special fund" exception, the court has concluded that a financial obligation which is "secured by and payable exclusively from revenues to be realized from public property acquired with the proceeds of the obligations or assessments on private property benefited by the special improvements" is exempt from the debt limitation of Article X, Section 13. *State ex rel. Lesmeister v. Olson*, 354 N.W.2d 690, 695 (N.D. 1984) (citing *Marks v. City of Mandan*, 296 N.W. 39 at 47 (N.D. 1941)). Based upon the "special fund" exception, if the deficit fund balance of an occupational or professional board met the criteria of the "special fund" exception, the deficit may be considered an exception to the indebtedness provision in Section 13.

SUMMARY

An occupational or professional licensing board, for the purposes of liability, is a state entity that participates in and is covered by the state's risk management fund. The state would defend and be liable for a claim against an occupational or professional board for an injury proximately caused by the alleged negligence, wrongful act, or omission of the board.

While no statutory authority exists for an occupational or professional licensing board to maintain a deficit fund balance, the absence of the express or implied statutory authority to maintain a deficit fund balance may prohibit a board from doing so. Two exceptions, however, known as the "current expenses" and "special fund" exceptions may create the circumstances under which a board may be authorized to maintain a deficit fund balance.